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C S International Design Consortium Sdn Bhd v HSB Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO 12B-92–03 OF 2012
NALLINI PATHMANATHAN J
6 FEBRUARI 2014

Contract — Lump sum contract — Fees for consultancy services rendered on variation works — Whether fees payable for entire contract pre-determined — Whether contract did not provide for payment in respect of variation works — Whether consultant should have contracted separately for payment for services rendered on variation works — Whether escalation of total construction cost of project from original estimate did not alter fact contract was lump sum contract

The appellant was engaged as the project manager, mechanical and structural consultant and quantity surveyor on the respondent's project pursuant to two contracts between the parties. In a suit against the respondent in the sessions court, the appellant claimed RM247,422.55 as unpaid professional fees for services it had rendered on variation works which were carried out by the main contractor ('Santarli') at the request of a third party ('SAKL') which took over a portion of the project from the defendant. The total value of the variation works done was RM6.4m and the appellant claimed 3.65% of that amount as its fees. The appellant contended that its agreements with the respondent were not lump sum contracts as the total construction costs remained to be assessed. The construction costs had risen from the initially-estimated RM65m to RM80.2m (excluding the variation works). The appellant maintained that even if the contracts were considered to be lump sum contracts, it was still entitled to be paid for services rendered on the variation works. The respondent counter-argued that the two contracts were lump sum contracts wherein the appellant's fees were fixed at 3% of the total construction cost in respect of project management and mechanical and structural consultancy while its fees as quantity surveyor was fixed at RM467,500. It argued that there was no provision in the two contracts for the appellant to be paid for variation works and, like other consultants on the project, the appellant should have entered into a separate contract either with the respondent or with SAKL for payment in respect of the variation works. The respondent also raised an equitable set-off to the appellant's claim, maintaining that it had overpaid the appellant in the sum of RM545,575. The sessions court dismissed the appellant's claim leading to the instant appeal.

Held, dismissing the appeal with costs of RM8,000:

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(1) The trial court did not err in concluding that the contracts were lump sum contracts. The fact that the total construction costs varied from an original estimate of RM65m to RM80.2m did not denigrate from the fact the contracts were lump sum contracts because the price was pre-determined or fixed at 3.65% of the total construction cost; and that sum was paid. The appeal record did not show the contracts to be subject to measurement upon completion of the project or subject to bills of quantities (see para 16).

(2) Clause 3 of the contract, which stipulated that the contractor was entitled to a percentage of the total construction costs when that sum had been fully or properly assessed, did not postpone the assessment of the amount to be paid to the contractor to the end of the contract such that it was subject to, or contingent upon, the final figure. Instead, the contracts clearly showed that the parties were fully cognisant at the outset of the quantum the contractor hoped to receive, namely, 3% of the total construction works which was estimated to be RM80.2m at the material time (see para 17).

(3) The trial court did not err in concluding that as there was no express agreement between the parties for payment for variation works, the appellant was not entitled to its claim. In Santarli's case, it entered into a new agreement or final accounts agreement with the respondent under which the respondent expressly agreed to pay Santarli for variation works. There was no such express agreement with the appellant. Furthermore, the variation works were requested for by SAKL and not by the respondent and the trial judge was right in finding the appellant ought to have entered into a separate agreement with SAKL, if not the respondent, for claims in respect of the variation works (see paras 18–20).

(4) At the trial, the appellant's primary witness, SP1, testified that the appellant was overpaid in the sum of RM299,370. While this figure did not amount to the full equitable set-off sum of RM545,575 asserted by the respondent, the sum acknowledged by SP1 exceeded the appellant's claim. Therefore, it could not be said that the trial judge erred in concluding that the respondent was entitled to plead a set-off in at least that sum which was sufficient to set-off the appellant's claim (see para 21).

[Bahasa Malaysia summary

Perayu dilantik sebagai pengurus projek, perunding mekanikal dan struktur dan juruukur untuk projek responden berikutan dua kontrak antara pihak-pihak. Dalam guaman terhadap responden di mahkamah sesyen, perayu menuntut RM247,422.55 sebagai bayaran profesional yang tidak dibayar untuk perkhidmatan yang diberikannya bagi kerja-kerja pengubahan yang dijalankan oleh kontraktor utama ('Santarli') atas permintaan pihak ketiga

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('SAKL') yang mengambil sebahagian projek itu daripada defendan. Nilai keseluruhan kerja-kerja pengubahan yang dilakukan adalah sejumlah RM6.4 juta dan perayu telah menuntut 3.65% daripada jumlah itu sebagai bayarannya. Perayu berhujah bahawa perjanjiannya dengan responden bukan kontrak sekaligus kerana keselurhan kos pembinaan masih perlu ditaksirkan. Kos-kos pembinaan telah meningkat daripada anggaran terdahulu sejumlah RM65 juta kepada RM80.2 juta (tidak termasuk kerja-kerja pengubahan). Perayu menegaskan bahawa meskipun kontrak-kontrak itu dianggap kontrak-kontrak sekaligus, ia masih berhak untuk dibayar bagi perkhidmatan yang dilakukan untuk kerja-kerja pengubahan itu. Responden telah membalas hujah dengan berkata bahawa dua kontrak adalah kontrak-kontrak sekaligus yang mana bayaran perayu ditetapkan pada 3% daripada kos keseluruhan pembinaan berkaitan projek pengurusan dan rundingan mekanikal dan struktur manakala bayarannya sebagai juruukur adalah ditetapkan pada RM467,500. Ia dihujahkan bahawa tiada peruntukan dalam dua kontrak untuk perayu dibayar bagi kerja-kerja pengubahan dan, seperti perunding-perunding lain untuk projek itu, perayu patut telah memasuki kontrak berasingan sama ada dengan responden atau dengan SAKL untuk bayaran berkaitan kerja-kerja pengubahan itu. Responden juga menimbulkan penepian ekuiti terhadap tuntutan perayu, dengan menegaskan bahawa ia telah terlebih bayar perayu sejumlah RM545,575. Mahkamah sesyen telah menolak tuntutan perayu yang menyebabkan rayuan ini.

Diputuskan, menolak rayuan dengan kos sebanyak RM8,000:

(1) Mahkamah perbicaraan tidak silap dalam memutuskan bahawa kontrak-kontrak itu adalah kontrak-kontrak sekaligus. Fakta bahawa keseluruhan kos pembinaan yang berbeza daripada anggaran asal RM65 juta kepada RM80.2 juta tidak merendahkan fakta bahawa kontrak-kontrak itu adalah kontrak-kontrak sekaligus kerana harga yang ditentukan sebelum atau ditetapkan pada 3.65% daripada keseluruhan kos pembinaan; dan jumlah tersebut telah dibayar. Rekod rayuan tidak menunjukkan kontrak-kontrak itu tertakluk kepada ukuran setelah projek itu siap atau tertakluk kepada bil-bil kuantiti (lihat perenggan 16).

(2) Fasal 3 kontrak itu, yang menetapkan bahawa kontraktor berhak mendapat suatu peratusan daripada keseluruhan kos pembinaan apabila jumlah itu telah ditaksir sepenuh atau sewajarnya, tidak menangguhkan taksiran untuk jumlah yang kena dibayar kepada kontraktor ke akhir kontrak itu sehingga ia tertakluk kepada, atau bergantung kepada, jumlah terakhir. Sebaliknya, kontrak-kontrak itu jelas menunjukkan bahawa pihak-pihak menyedari sepenuhnya dari awal lagi kuantum yang diharapkan untuk diterima oleh kontraktor itu, iaitu 3% daripada keseluruhan kerja-kerja pembinaan yang dianggarkan berjumlah RM80.2 juta pada masa matan (lihat perenggan 17).

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(3) Mahkamah perbicaraan tidak silap dalam memutuskan bahawa oleh kerana tiada perjanjian nyata antara pihak-pihak untuk bayaran kerja-kerja pengubahan, perayu tidak berhak terhadap tuntutannya. Dalam kes Santarli, ia memasuki perjanjian baru atau perjanjian akaun terakhir dengan responden di mana responden dengan jelas bersetuju untuk membayar Santarli bagi kerja-kerja pengubahan itu. Tiada perjanjian nyata sedemikian dengan perayu. Tambahan pula, kerja-kerja pengubahan itu diminta oleh SAKL dan bukan oleh responden dan hakim perbicaraan adalah betul kerana mendapati perayu patut memasuki perjanjian berasingan dengan SAKL, jika tidak responden, berhubung tuntutan berkaitan kerja-kerja pengubahan itu (lihat perenggan 18–20).

(4) Semasa perbicaraan, saksi utama perayu, SP1, memberi keterangan bahawa perayu telah terlebih bayar sejumlah RM299,370. Walaupun angka ini bukan jumlah penepian ekuiti penuh RM545,575 sepertimana ditegaskan oleh responden, jumlah yang diakui oleh SP1 melebihi tuntutan perayu. Oleh itu, ia tidak boleh dikatakan bahawa hakim perbicaraan terkhilaf dalam memutuskan bahawa responden berhak mempli penepian sekurang-kurangnya bahawa jumlah tersebut adalah mencukupi untuk mengetepikan tuntutan perayu (lihat perenggan 21).]

Cases referred to

Attorney General of Belize and others v Belize Telecom Ltd and another [2009] 2 All ER 1127, PC (refd)

CM Indah (dahulunya dikenali sebagai Chai Mio Constructions Sdn Bhd) v UB Ushabina Sdn Bhd [2006] MLJU 426; [2006] 4 CLJ 733, HC (refd)

Clarke v Edinburgh & District Tramways Co 1919 SC (HL) 35, HL (refd)

Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahbudin & Anor [2010] 4 MLJ 577, FC (refd)

Teknik Segala Sdn Bhd v Salcon Engineering Bhd [2012] 9 MLJ 529, HC (refd)

Ong Chee Kwan (Lee Ong & Kandiah) for the appellant.
Adi Radlan (Adi Radlan & Co) for the respondent.

Nallini Pathmanathan J:

[1] This is an appeal by the appellant who was the plaintiff in the court below, against the decision of the learned sessions court judge dismissing its claim in the sum of RM247,422.55 with costs. The salient background facts are fully set out in the written submissions of learned counsel for the appellant and the respondent. The parties will be referred to as the plaintiff and the defendant for ease of reference. Given the notes of proceedings above and the factual background as set out in the written submissions, I do not propose to repeat the facts again.

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[2] It is not in dispute that the primary issue that arises in this appeal is whether the plaintiff is entitled to its claim for fees for services rendered in respect of variation works. Put another way, is the plaintiff entitled to fees equivalent to 3.65% of the variation works of RM6,395,000 pursuant to the terms of the contract between the parties as set out in two letters of offer dated 1 October 2005 and 1 September 2006.

[3] In this context it is again not in dispute that the plaintiff concedes that it has been paid in full by the defendant save for the claimed sum of RM247,422.55 which it now claims as its professional fees due for variation works that were performed by the main contractor, one Santarli Sdn Bhd. The plaintiff was at all material times the project manager and mechanical and structural consultant. Subsequently vide the second letter of appointment it was appointed as the quantity surveyor for the project.

[4] Under the terms of its first letter of appointment dated 1 October 2005 cl 3 provides that the plaintiff's professional fee was to be 3% of the total construction cost plus 5% government service tax. The clause also provides as follows:

> The fees shall be converted to a lump sum upon award of the contract based on the above scale.

[5] Clause 4 provides that the estimated total construction cost of the project was RM65m which sum was to be adjusted when the actual construction costs are established. In para 6 of the statement of claim the plaintiff pleads that the total construction costs were based on the awarded total tender package of RM80.2m.

[6] Vide the second letter of appointment dated 1 September 2006 the plaintiff's fees as quantity surveyor was fixed at RM467,500.

[7] The plaintiff makes claim under the foregoing contracts for variation works which were subsequently ordered at the behest of a third party, one Somerset Ampang Kuala Lumpur Sdn Bhd ('SAKL') which took over a portion of the project from the defendant. These variation works were specifically requested for by SAKL. It is not in dispute that these variation works were in fact carried out.

[8] The total value of the variation works carried out is RM6,395,000 and the plaintiff seeks 3.65% of this sum together with 5% government service tax. In other words, it was the plaintiff's stance in the court below that it is entitled under the terms of the contracts it has entered into with the defendant to be paid 3.65% of the value of the variation works in its capacity as project

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manager, mechanical and structural consultant and quantity surveyor. The plaintiff has issued invoices claiming these monies. This forms the basis for its claim in the court below. To this end it points to the fact that the defendant has in fact been paid in full by SAKL who sought these variation works. Finally the plaintiff points to the fact that all other consultants on this project were in fact paid for the variation works.

[9] The plaintiff's legal arguments in support of its claim were that the contracts entered into between the plaintiff and the defendant did not comprise a lump sum contract but remained to be assessed according to the escalating construction costs. To this end the plaintiff relies on the series of invoices it issued which reflects that the construction costs were not stagnant but rose from RM65m (in the contract) to RM80.2m (without the variation works). The plaintiff points out that the contract makes reference to a conversion of the contract to a lump sum contract upon award of the same. Such conversion, it is contended did not take place.

[10] Further or alternatively the plaintiff maintains that even if the contracts are lump sum contracts the plaintiff is still entitled to be remunerated under the same for the variation works carried out.

[11] The defendant, in reply maintained in the court below that the plaintiff was not entitled to make claim for fees for the variation work because:

(a) the two letters of offer or award dated 1 October 2005 and 1 September 2006 respectively are lump sum contracts. Under a lump sum contract the parties agree at the outset on a pre-determined fee for the entire scope of works to be conducted. As such under the express terms of these contracts the plaintiff is precluded from making claim outside of the 3.65% for the scope of works covered by the contracts. The plaintiff's claim is for variation works which are outside the scope of the works contracted for under the foregoing letters of award or offer. As such there is no express entitlement under these contracts for such variation works. In other words the defendant maintains that the plaintiff was constrained to enter into a further or new or supplemental contract with the defendant for these variation works. The defendant in other words maintains that under the express terms of the agreement between the parties there is no provision for payment for variation works and such an entitlement cannot and ought not to be implied (see *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] 2 All ER 1127 Privy Council per Lord Hoffman at para 17 of the judgment: '... When an instrument did not provide expressly for what was to happen when some event occurred, the most usual inference was that nothing was to happen. Although in certain cases the court would imply a term, the purpose of such an implication was to spell out the meaning of the

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instrument, not to make an addition to the instrument.').

(b) in further support of this contention the defendant points to the fact that all the other consultants entered into separate contracts with SAKL to procure payment for the variation works. The main contractor, Santarli entered into a final account agreement where it procured the agreement of the defendant to make payment for the variation works. The plaintiff did not enter into any such agreement with the defendant. The defendant maintains in this context that the plaintiff should look to SAKL for payment of monies for the variation works as these works were carried out at the behest of SAKL;

(c) the defendant also pleaded in its defence in the alternative that there is an implied term in the two letters of offer or award that the plaintiff's fees were fixed or pre-determined as at the rates set out therein, namely 3% of the project management works and civil and structural consultancy, as well as a fixed sum of RM467,500 for the quantity survey work; and

(d) finally and in any event, the defendant pleaded an equitable set-off, maintaining that it had overpaid the plaintiff in the sum of RM545,575. While the fact of this payment is not in issue, the plaintiff in response maintains that it is an 'additional payment' or a 'bonus'.

[12] The learned sessions court judge dismissed the plaintiff's claim, accepting in totality the three defences put forward by the defendant. The learned judge did so after hearing the entirety of the oral evidence put forward in this case, namely two witnesses for the plaintiff and one for the defendant.

[13] As stated at the outset the plaintiff maintains that the learned judge erred in so determining because:

(a) it is contended that the contracts between the plaintiff and the defendant are not lump sum contracts, but contracts which were contingent upon the quantum of total construction costs which altered from time to time. This begs the question on appeal as to whether the learned judge erred in concluding that the contracts entered into between the plaintiff and the defendant were in fact lump sum contracts or otherwise;

(b) the plaintiff further contends that even if the learned judge was correct in concluding that the contracts were lump sum contracts, this does not preclude the payment of monies for variation work carried out in relation to the project. In short, the plaintiff maintains that it was not necessary for it to enter into a supplemental contract with the defendant in order to procure payment for its role in the project management and other consultancy services provided in relation to the variation works; and

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(c) the plaintiff also contends that the learned sessions court judge erred in accepting the defence of an equitable set-off when the defendant failed to provide proof of such quantum of overpayment.

[14] I shall deal with each of these contentions in turn.

Did the learned judge err in concluding that the contracts or letters of award between the plaintiff and defendant amounted to lump sum contracts

[15] As agreed by both learned counsel for the plaintiff and the defendant, the issue of what amounts to a lump sum contract was considered in *CM Indah (dahulunya dikenali sebagai Chai Mio Constructions Sdn Bhd) v UB Ushabina Sdn Bhd* [2006] MLJU 426; [2006] 4 CLJ 733 at pp 426, 739, paras 14–15. I do not propose to reproduce the passage here. Suffice to state that a lump sum contract is a contract whereby the parties agree to a fixed price to execute specific and defined building works. In other words the price is pre-determined or fixed. The contractor is then entitled to be paid the pre-agreed lump sum as and when he substantially completes the work. Reference is also made to the fact that although the lump sum is the starting point it is comparatively rare for the price the contractor is entitled to receive at the end of the day to be exactly the same as the lump sum. It is subject to adjustment for extra work, fluctuations etc.

[16] That indeed would appear to be the case here as borne out by the fluctuating figure from RM65m to RM80.2m (as accepted by the plaintiff) for the total construction works. The fact that the total construction costs varied from an original estimate of RM65m to RM80.2m does not denigrate from the contract being a lump sum contract because the price was pre-determined or fixed at 3.65% of the total construction cost. And that sum was paid. The contract as it appears in the appeal records is certainly not a contract that is subject to measurement upon completion of the project or bills of quantity. It appears to this court to fall squarely within the ambit of a lump sum contract, as found by the learned sessions court judge. I am unable to agree that she erred in this respect.

[17] On an ancillary note in this respect, it was also sought to be contended that the contract was never 'converted' to a lump sum contract. However an objective construction of cl 3 of the contract to my mind stipulates that the contractor is entitled to a percentage of the total construction costs when that sum has been fully or properly assessed, namely upon award of the contract. This does not postpone the assessment of the quantum to be paid to the contractor to the end of the contract such that it is subject to, or contingent upon the final figure. Instead the contract clearly envisages that the parties are fully cognisant at the outset of the contract of the quantum of monies the

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contractor hopes to receive, namely 3% of the total construction costs which was estimated to be RM80.2m at the material time. The issue of any subsequent 'act' of 'conversion' does not, to my mind have to take effect. In any event this issue was not fully canvassed before the learned sessions court judge. It was only briefly touched upon by the plaintiff's primary witness in the course of his evidence. That is insufficient to my mind to establish that the contracts in the instant case fall outside the definition or purview of lump sum contracts. In all these circumstances I am satisfied that the learned sessions court judge did not err in concluding that this was a lump sum contract.

Did the learned sessions court judge err in concluding that the plaintiff was not entitled to make claim for the variation works in the absence of any specific agreement to this effect between the plaintiff and the defendant

[18] The plaintiff's contention here is that it is entitled to be paid for the variation works undertaken in the same manner as Santarli, the main contractor was paid for variation works. However the distinguishing factor in relation to Santarli is that it entered into a new agreement or a final accounts agreement with the defendant whereby there was express consent on the part of the defendant to make payment for the variation works. In other words there was an further agreement which expressly stipulated that the defendant agreed to make payment to Sartali for the variation works. There is no such express agreement in the case of the plaintiff.

[19] It appears to this court that the learned sessions court judge did not err in concluding that as there was no such express agreement in the case of the plaintiff and the defendant, the plaintiff was not entitled to its claim for variation works, which fell outside the scope of the lump sum contract. The case of *Teknik Segala Sdn Bhd v Salcon Engineering Bhd* [2012] 9 MLJ 529 affords further support for her conclusion, as Zaleha Yusof J found in that case that as the contract was a lump sum contract, it was incumbent upon the claimant to prove that there was an agreement between the parties for variations and additional works in order for it to recover further payments. As in this case there was no agreement there between the parties for any variation works and the claim was therefore not allowed.

[20] A further point to be noted is that the variation works were requested for a by a third party, SAKL and not the defendant. The two other consultants also entered into separate agreements with SAKL for payment in respect of these variation works. The plaintiff did not do so. Again to my mind, the learned sessions court judge did not err in concluding that the plaintiff ought to have entered into a separate agreement with SAKL (if not the defendant) for claims in respect of the variation works.

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Did the learned judge err in accepting the defence of an equitable set-off, namely that the plaintiff was overpaid by a sum of RM545,575 when the defendant failed to provide proof of such quantum of overpayment

[21] It is evident from a perusal of the notes of proceedings that the plaintiff's primary witness, namely SP1, Soo Chee Sern, accepted (see p 43 of the *rekod rayuan tambahan*) in the course of cross-examination that he had overbilled and been overpaid in the sum of RM299,370. While this does not amount to the full equitable set-off sum of RM545,575 asserted by the defendant, the sum acknowledged by SP1 exceeds the claim now made by the plaintiff. It cannot be said that the learned judge erred in concluding that the defendant was entitled to plead a set-off in at least this sum which is sufficient to set-off the plaintiff's claim. This ground also has no merit.

[22] Having read the appeal record in its entirety, it appears to this court that the appeal has no merits. In so concluding I have taken into consideration the fact that there was a full trial in the court below where the learned sessions court judge had the advantage of seeing and hearing the witnesses in full. This court should therefore be slow to interfere in any findings of fact made by that court, unless plainly wrong, (see *Clarke v Edinburgh & District Tramways Co* 1919 SC (HL) 35 and *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahbudin & Anor* [2010] 4 MLJ 577). The appeal is therefore dismissed with costs of RM8,000 to the respondent.

Appeal dismissed with costs of RM8,000.

Reported by Ashok Kumar